

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** November 20, 2018

**Thru:** Bridget C. Bohac, Chief Clerk  
Toby Baker, Executive Director

**From:** L'Oreal W. Stepney, P.E., Deputy Director  
Office of Water

**Docket No.:** 2017-0065-RUL

**Subject:** Commission Approval for Rulemaking Adoption  
Chapter 35, Emergency and Temporary Orders and Permits; Temporary  
Suspension or Amendment of Permit Conditions  
Chapter 37, Financial Assurance  
Chapter 50, Action on Applications and Other Authorizations  
Chapter 55, Requests for Reconsideration and Contested Case Hearings;  
Public Comment  
Chapter 80, Contested Case Hearings  
Chapter 281, Applications Processing  
Chapter 290, Public Drinking Water  
Chapter 291, Utility Regulations  
Chapter 293, Water Districts  
HB 1600 and SB 567: PUC Transfer (83rd Leg.); HB 294 and SB 1842 (85th  
Leg.); and Staff-Initiated Regulatory Assessment Fee Revisions  
Rule Project No. 2013-057-291-OW

### **Background and reason(s) for the rulemaking:**

The adopted rulemaking would implement House Bill (HB) 1600 and Senate Bill (SB) 567, 83rd Texas Legislature, 2013; and HB 294 and SB 1842, 85th Texas Legislature, 2017. HB 1600 by Representative Byron Cook and SB 567 by Senators Kirk Watson and Robert Nichols, related to the transfer of the utilities and rates program to the Public Utility Commission of Texas (PUC). HB 294, by Representative Armando Walle, added criteria to Texas Water Code (TWC), §13.412(a) that allows the Texas Commission on Environmental Quality (TCEQ, agency, or commission) to request that the attorney general appoint a receiver to a water or sewer utility that violates a final judgment issued by a district court in a suit brought by the attorney general under TWC, Chapter 7 or 13; or Texas Health and Safety Code (THSC), Chapter 341. SB 1842 amended THSC, §341.035(d) to include a Class A utility as defined by TWC, §13.258 among the entities exempt from the requirement to file a business plan for a public drinking water supply system with the TCEQ. The Class A utility is required to have applied for or been granted an amendment of a certificate of convenience and necessity (CCN) under TWC, §13.258 for the area in which the construction of the public drinking water supply will operate.

The adopted rulemaking would amend and repeal obsolete TCEQ rules relating to the economic regulation of water and sewer utilities as directed by the legislature.

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**Scope of the rulemaking:**

**A.) Summary of what the rulemaking will do:**

The adopted rulemaking would amend and repeal sections in 30 TAC Chapters 35, 37, 50, 55, 80, 281, 290, 291, and 293 to reflect changes to TWC, Chapters 5 and 11 - 13. Additionally, the adopted rulemaking would amend §291.76 (Regulatory Assessment) to facilitate the ability to convert the Regulatory Assessment Fee (RAF) to an on-line reporting application.

**B.) Scope required by federal regulations or state statutes:**

The adopted rulemaking would implement HB 1600 and SB 567 (83rd Texas Legislature, 2013) and HB 294 and SB 1842 (85th Texas Legislature, 2017). No federal statute or rule directly applies.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

TCEQ staff recommended amending §291.76 to convert the RAF from a self-report, self-pay fee to a billed fee. This would allow for an efficient, on-line reporting, invoicing, and payment structure within the confines of the commission's existing SUNSS, Basis2, and ePay applications. This fee conversion would also allow for the collection of delinquent fees, late fees, and penalty fees as directed by 30 TAC Chapter 12, Payment of Fees.

TWC, §5.701(n)(5) tasks the commission with collection of the RAF and establishing associated payment and collections procedures. The amendment to §291.76(d), (e), (h), (i), and (k) would allow the collections and penalties process to fit into the existing commission invoicing and collection structure, based on Chapter 12. The existing rule does not align with the functionality of existing commission resources including Basis2, the SUNSS portal, and ePay applications.

**§291.76(d)**

The amendment to §291.76(d) would provide clarification regarding the term "amount payable" to ensure regulated utilities understand the amount of RAF (i.e., "regulatory assessment amount payable") payable to the commission versus the bill amounts payable to the utility from their customers for water and sewer invoices. This has been a common area of confusion for the regulated community. The RAF rule does not apply to ancillary fees (e.g., late fees, tap fees, reclaimed water, etc.). The current language may result in improper calculation, reporting, and remittance of fees.

**§291.76(e)**

The amendment to §291.76(e) would clarify that amounts actually received within the calendar year are subject to the RAF. The current language refers to "payment period" which has caused some confusion for the regulated community. This confusion has led utilities to look for payments issued for service during the calendar year, billed in arrears, and has delayed reporting or led to incorrect reporting.

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**§291.76(h)**

The amendment to §291.76(h) would move the clause "retail water and sewer" before the words "charges" and "assessment collection" to specify that "retail water and sewer" apply to both "charges" and the "assessment collection."

**§291.76(i)**

The amendment to §291.76(i) would specify the due date for reporting, data item(s) to be reported, and means by which to report. Section 291.76(i)(1) - (3) would provide documented invoicing protocols and ensure that reporting remains a requirement, separate from invoicing. This amendment would convert the RAF from a self-report, self-pay, paper process to an electronic reporting, invoiced process within the confines of existing commission applications and Chapter 12.

**§291.76(k)**

The amendment to §291.76(k) would specify the payment resources available through the commission and general penalty, interest, and collections information.

**Statutory authority:**

The rulemaking would be adopted under TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

**Effect on the:**

**A.) Regulated community:**

**HB 1600 and SB 567**

Beginning September 1, 2014, the regulated community began working with the PUC involving the economic regulation of water and sewer utilities. Water and wastewater utilities that are required to remit RAFs continue to remit RAFs to the TCEQ.

**HB 294**

Beginning September 1, 2017, a receiver, or temporary manager, can be appointed to a water and/or wastewater utility that violates a final judgment issued by a district court in a suit brought by the attorney general under TWC, Chapter 7 or 13; or THSC, Chapter 341.

**SB 1842**

Beginning September 1, 2017, a Class A utility, as defined by TWC, §13.002, is no longer required to submit a business plan for a public drinking water supply system with the TCEQ. The Class A utility is required to have applied for or been granted an amendment of a CCN under TWC, §13.258 for the area in which the construction of the public drinking water supply will operate.

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**Staff recommended amendments**

The utilities to which the RAF is applicable would transition their reporting from a paper coupon with manual fee calculation and remittance to an on-line portal which auto calculates and offers ePay or invoice options. The automatic calculation of the applicable fee would eliminate incorrect fee remittance due to human mathematical error.

**B.) Public:**

**HB 1600 and SB 567**

There are no anticipated effects on the public as the economic regulation of water and sewer utilities was transferred to the PUC on September 1, 2014.

**HB 294**

The public may be impacted by an increase in the water and or sewer service rates to fund any required system upgrades, temporary manager fees, or receiver fees; however, those costs are unknown.

**SB 1842**

There are no anticipated effects on the public as a result of Class A utilities no longer being required to submit a business plan for a public drinking water supply system with the TCEQ.

**Staff recommended amendments**

The public receiving services from utilities should see no impact. The fee the public is charged remains unchanged.

**C.) Agency programs:**

The staff recommended amendments to §291.76 would convert the RAF from a self-report, self-pay fee to an electronic self-report, billed fee within the commission's existing business processes and resources. This would improve efficiency of fee administration through utilization of existing commission technological resources and leveraging them to accomplish additional reporting and remittance.

The automatic calculation of the applicable fee would eliminate fee remittance errors. The improved accuracy of fees calculation would improve customer service and interactions with the regulated community, reduce the resources diverted to refunding of overpayment or demand of underpayment, and allow for a strong audit trail of transaction records.

The electronic reporting function would be more efficient concerning data entry, fee calculation and remittance, invoicing, and financial administration processes. The inclusion of the fee in the commission's existing invoice process would ensure payment coupons are compatible with TCEQ's Financial Administration Division's physical equipment and include the accounts in the existing fees, penalties, and collections procedures.

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**Stakeholder meetings:**

There were no stakeholder meetings held; however, a rule public hearing was offered during the comment period.

**Public comment:**

The commission offered a public hearing on August 7, 2018. The comment period closed on August 13, 2018. The commission received comments from Bickerstaff Heath Delgado Acosta LLP (Bickerstaff) regarding Chapter 291. Specifically, Bickerstaff:

- recommended that the last sentence of §291.130(d) be deleted or revised, because it was unclear what the commission considers to be "within the commission's jurisdiction" or outside of the commission's jurisdiction as it relates to a petition filed under TWC, §11.041;
- commented that TWC, §11.041(b) requires the commission to hold a hearing, and on completion of that hearing, "render a written decision" regarding the complaint. Bickerstaff commented that all of the items listed in TWC, §11.041 are within the commission's jurisdiction to decide, and the commission is obligated to consider and render a decision on each of the elements, even if the executive director does not provide testimony or evidence on each element;
- commented that what is outside the commission's authority or jurisdiction is the ability to set a rate for the water should the commission determine the petitioner is entitled to the water, is willing to pay a just and reasonable rate, the water supplier has available water not contracted to others, and the water supplier either refused or failed to supply the water, or the price or rental demanded by the water supplier is not reasonable and just or is discriminatory. The PUC has the jurisdiction to fix a reasonable rate or price for the water as provided by TWC, §12.013, and although PUC may participate under TWC, §11.041, it does not limit TCEQ's jurisdiction over the four elements listed in TWC, §11.041;and
- recommended that alternatively, the last sentence of §291.130(d) should be clarified to state that the executive director will not provide evidence or testimony to fix the rate for the water, which is reserved for the PUC.

**Significant changes from proposal:**

No significant changes were made from proposal, however, in response to the comment from Bickerstaff, language was added to §291.130(d) to clarify which elements in TWC, §11.041(a) the commission has jurisdiction over.

**Potential controversial concerns and legislative interest:**

There are no controversial issues associated with the implementation of HB 1600 and SB 567. The adopted rulemaking would implement HB 1600 and SB 567 by amending and repealing obsolete TCEQ rules relating to the economic regulation of water and sewer utilities.

There are no anticipated controversial concerns with HB 294, SB 1842, or the staff recommended rule amendments. Representatives Lyle Larson, Eddie Lucio III, and Armando Walle have all shown interest in HB 294.

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**Does this rulemaking affect any current policies or require development of new policies?**

No.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

If this rulemaking is not adopted, Chapters 35, 37, 50, 55, 80, 281, 290, 291, and 293 will be inconsistent with existing state statutes. There are no alternatives to this rulemaking.

**Key points in the adoption rulemaking schedule:**

*Texas Register* proposal publication date: July 13, 2018

Anticipated *Texas Register* adoption publication date: December 28, 2018

Anticipated effective date: January 3, 2019

Six-month *Texas Register* filing deadline: January 14, 2019

**Agency contacts:**

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**Attachments:**

HB 1600 (83rd Texas Legislature, 2013)

SB 567 (83rd Texas Legislature, 2013)

HB 294 (85th Texas Legislature, 2017)

SB 1842 (85th Texas Legislature, 2017)

cc: Chief Clerk, 2 copies  
Executive Director's Office  
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